

FILE COPY

Office - Supreme Court, U. S.

FILED

NOV 3 1947

CHARLES ELMORE CRISLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 425

FERN NORTH GISHWILLER and
CALUMET BOND & INVESTMENT COMPANY,
Petitioners.

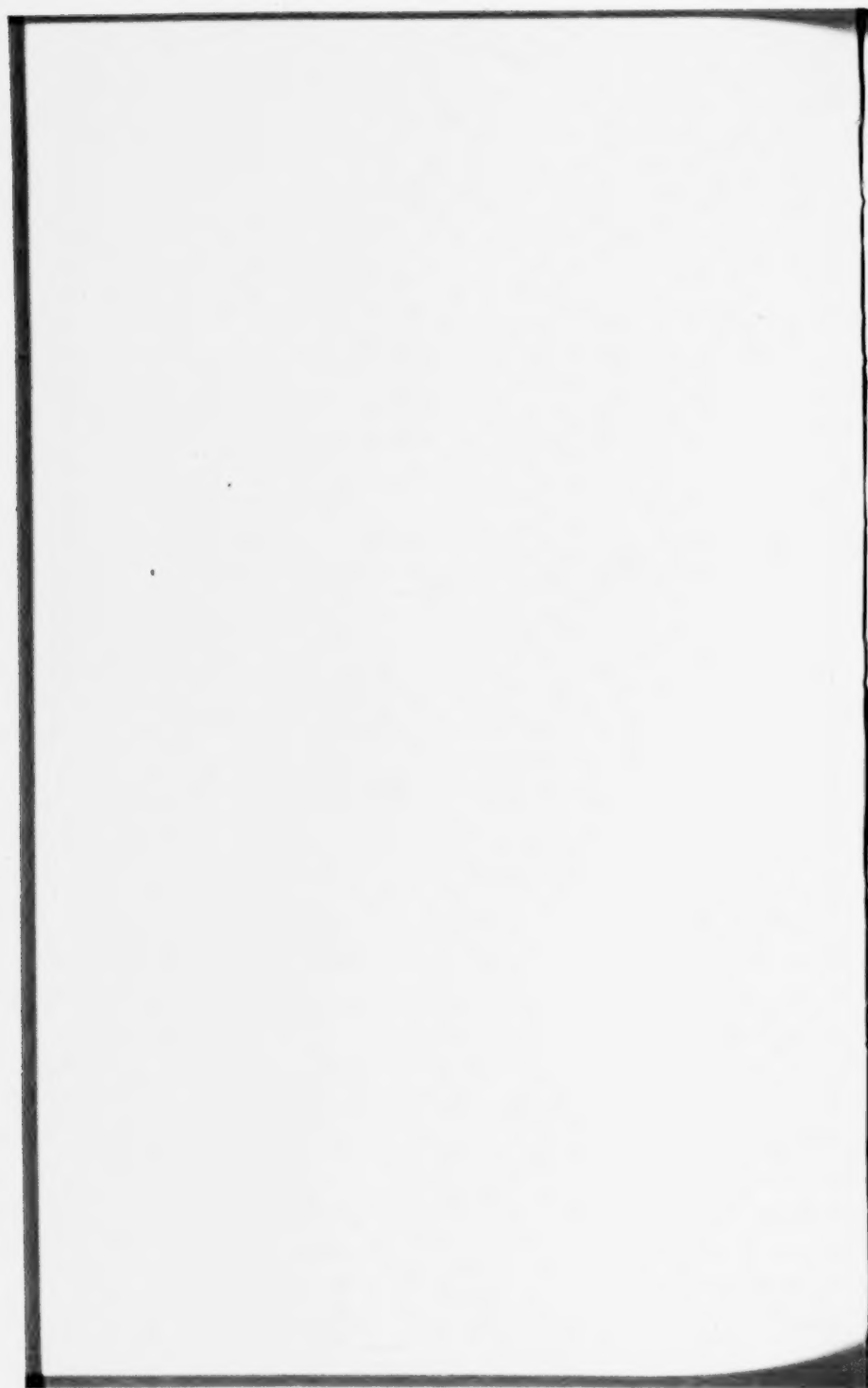
vs.

JOSEPH T. CONNOLLY, as Receiver of Calumet National
Bank of Chicago, a National Banking Association,
(in liquidation),
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

↓
↓
OTIS F. GLENN,
RAYMOND G. REAL,
OTTO W. BARNES,
Counsel for Petitioners.

RAYMOND G. REAL,
Of Counsel.



INDEX.

| | PAGE |
|--|-------|
| Jurisdiction of the Court | 6 |
| Statement of Matters Involved | 1-6 |
| Questions Presented | 6-8 |
| Reasons Relied on for Allowance of the Writ | 8-11 |
| Brief: | |
| (a) Decrees Below | 13 |
| (b) Jurisdiction of the Court | 6 |
| (c) Statement of Matters Involved | 1-6 |
| (d) Constitutional Provisions Involved | 31 |
| (e) Federal Statutes Involved | 31-32 |
| (f) Rules of Civil Procedure Cited | 31 |
| (g) Specification of Assigned Errors | 14-15 |
| Argument | 16-29 |
| Conclusion | 30 |
| Motion to Dispense with Printing of Evidence | 34-35 |
| Appendix | 31-34 |

LIST OF AUTHORITIES CITED.

| | |
|--|------------|
| DeBeers Consolidated Mines v. United States, 325 U. S. 212, at 222 | 10, 23, 27 |
| Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 | 18 |
| Hale v. Henkel, 201 U. S. 43, at 76 | 18 |
| Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, at 378 | 27 |
| Interstate Circuit Inc. v. U. S., 304 U. S. 55, at 56 | 20, 22 |
| Kelleam v. Maryland Casualty Co., 312 U. S. 377, at 381 | 27 |

| | PAGE |
|--|--------|
| Pennoyer v. Neff, 95 U. S. 714, at 733 | 17 |
| Railroad Commission v. Maxey, 281 U. S. 82 | 20, 22 |
| Railroad Commission v. Pacific Gas Co., 302 U. S. 388, at 393 | 17 |
| Scott v. McNeil, 154 U. S. 34 | 17 |
| The Pusey & Jones Corp. v. Hanssen, 261 U. S. 491, at 497 | 27 |
| Truax v. Corrigan, 257 U. S. 312, at 332 | 17 |
| Twining v. New Jersey, 211 U. S. 78, at 110 | 17 |

RULES OF CIVIL PROCEDURE.

| | |
|--|---------------------|
| Rule 52 of Civil Procedure for District Courts of the United States | 4, 7, 9, 15, 20, 31 |
|--|---------------------|

CONSTITUTIONAL PROVISIONS.

| | |
|--|-------------------------|
| Fourth Amendment to Constitution of the United States | 6, 7, 9, 14, 17, 18, 31 |
| Fifth Amendment to Constitution of the United States | 6, 9, 14, 17, 18, 31 |

STATUTES.

| | |
|--|-----------|
| Judicial Code, Section 240, Amended (28 U. S. C. A. Sec. 347) | 6, 31, 32 |
|--|-----------|

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No.

FERN NORTH GISHWILLER and
CALUMET BOND & INVESTMENT COMPANY,
Petitioners.

vs.

JOSEPH T. CONNOLLY, as Receiver of Calumet National
Bank of Chicago, a National Banking Association,
(in liquidation),
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

STATEMENT OF MATTERS INVOLVED.

MAY IT PLEASE THE COURT:

This suit stems from a proceeding to liquidate the Calumet National Bank of Chicago, which was closed by the Comptroller of the Currency on October 1, 1931 (R. 741 Par. 1.)

Clarence F. Buck was appointed successor receiver for said bank on June 22, 1932, upon the death of the first receiver, and continued to act as receiver until April 22, 1936, the effective date of his resignation (R.741 Par. 1).

Thereupon Harry E. Hallenbeck was appointed successor receiver (R. 744 Par. 1), and as such receiver was the nominal plaintiff in this cause. Hallenbeck, as receiver, brought suit against the former receiver, Clarence F. Buck; one Richard Cramer; the petitioners herein, Fern North Gishwiller and the Calumet Bond and Investment Company,* and 28 other defendants (R. 739, Par. 1). Buck was subsequently dismissed as a defendant because of lack of sufficient allegations in the complaint (R. 239).

The bill of complaint filed in the District Court alleges that the defendants conspired among themselves and with others to sell the assets of the Calumet National Bank of Chicago at a price lower than their fair value. It is alleged, among other things, that petitioner Gishwiller was retained by the several receivers to supervise the handling of the liquidation of the assets; that she was delegated to obtain appraisals and bids for the sale of the bank's assets and in that respect acted as a representative of the receivers; that she made recommendations to the several receivers with respect to the sale and disposition of said assets; that she and the other defendants abstracted indicia of title from the receivership files in order that an asset could be sold or mortgaged before the receiver was paid for said asset; that the petitioner, Investment Company, was the instrumentality through which assets acquired from the bank receiver were ultimately disposed of for the benefit of the defendants and, in pursuance of such a plan, she acquired all of the outstanding stock of the Investment Company for little or no consideration (R. 4 to 10).

The evidence is undisputed that prior to the appointment of the several receivers, the petitioner Gishwiller

* Hereinafter referred to as the "Investment Company."

was a stenographer in the trust department of the bank and was retained by said receivers, after their respective appointments, as a stenographer (Tr. 86 to 94, 5164). She resigned her position and had no connection with the receivership after November 30, 1936 (R. 540, Par. 3).

The evidence is also undisputed that in January 1935, the defendant Richard Cramer made an arrangement with receiver Buck to take title to the bank's assets for the purpose of selling and disposing of said assets. Cramer was to account to the receivership after said sales. In order to conclude such transactions, Cramer was given deeds to the real estate, as well as possession of other documents, in accordance with the said arrangement had with receiver Buck. These arrangements were made by Cramer and Buck in January 1935 (Master R. 438, Par. 2. C. C. A., R. 742, Par. 2). The evidence is uncontroverted that Gishwiller did not meet Cramer until the following February or March, 1935 (Master R. 431, Par. 2. C. C. A., R. 741, Par. 3).

From May 1, 1935 until December 31, 1936, receivers Buck and Hallenbeck completed 20 transactions with Cramer in which 45 assets of the receivership were liquidated; 18 of such transactions involving 32 assets, are called into question in this litigation. Hallenbeck, as receiver, concluded four such transactions with Cramer from April 22 to December 31, 1936. He also concluded three transactions which had been arranged for by Buck but were uncompleted at the time of Buck's resignation. The prices for all of said assets were agreed upon between the receivers and Cramer (Tr. 586 to 859, 5470, 6195, 6522, 6591-2, 6641, 6662, 7071, 7074, 7076).

This cause was referred to a master, who filed his report (R. 429) and supplemental report (R. 659). Neither of said

reports contains findings of fact and conclusions of law, as required by Rule 52, Federal Rules of Civil Procedure. The decree ignores two of the principal defendants, who died during the pendency of the proceedings. It directs two other defendants to convey certain properties and mortgages to the receiver appointed by the court. A money decree was entered against petitioners alone. All other defendants were dismissed or were unaffected by the decree (R. 690 to 702).

In a collateral proceeding on June 25, 1937, Leslie H. Klawans was appointed receiver for the petitioner Investment Company (R. 47). The appointment of said receiver was based upon one of the many false allegations contained in the complaint (R. 39, Par. 33) and the order of appointment was entered without service on any officer of said Investment Company or upon petitioner Gishwiller, the owner of its capital stock (R. 72, R. 67, Par. 2 and 3). The receiver, Klawans, without notice or color of authority, took possession of all of the real and personal property of petitioner Gishwiller at the time petitioner Gishwiller was on vacation, traveling by boat from New York to Los Angeles. Notice of her intention to so travel by boat was served upon William Prentiss, supervisor of insolvent banks, and J. L. Robertson, his counsel, on June 8, 1937 (R. 742, Par. 1 R. 397, Ex. "A"). Petitioner Gishwiller visited the comptroller's office in an effort to ascertain whether a report of the investigation of the affairs of the bank receivership would be filed during her vacation. She was assured that the report would not be filed prior to July 1, 1937, the date of the termination of her vacation and that she could proceed with it. This suit was filed during her vacation period.

In March, 1937 (Tr. 2901 to 2904), one Leon J. Gell, investigator for the Comptroller of the Currency was in-

vestigating the bank receivership where charges of irregularities were made (Tr. 2894, 2916 to 2918. R. 445, Par. 2 and 4).

Receiver Klawans petitioned the District Court (R. 51) to appoint Leon J. Gell to make an inventory, report and audit of the assets, books and records of the Investment Company, which petition was allowed (R. 54). Said Gell thereupon made an inventory, report and audit not only of the assets, books and records of the Investment Company, as authorized by the District Court, but included in such inventory the assets and records of petitioner Gishwiller (R. 214 to 225).

An application (R. 288) was made to discharge the receiver for the Investment Company and dissolve the injunction, or in the alternative, to limit the receivership and injunction to the single piece of property which was involved in this litigation and to return to petitioner Gishwiller the property illegally expropriated by the receiver.

After a hearing on the application, the District Court issued a memorandum opinion on November 14, 1939, in which it stated (R. 401):

“ * * * There are no authorities authorizing ‘equitable attachment,’ and as to the properties title to which is in Fern North Gishwiller, the injunction should be lifted.”

In its order (R. 404) dated November 22, 1939, based upon said memorandum opinion, the Court failed to dissolve the injunction or to direct the return of the real and personal property to petitioner Gishwiller, but the order did direct the return to said Gishwiller of 2-2/4th shares of stock of Paramount Pictures, Inc., having a value of approximately \$50.00 and 5 shares of the stock of Calumet National Bank, which even then carried a stock liability.

The lower courts failed to adjudicate the validity of the act of the receiver for the Investment Company in taking and retaining possession of the real and personal property of petitioner Gishwiller. The assignment of this error was included as Proposition IV in petitioners' brief in the Circuit Court of Appeals.

After the appointment of the receiver, petitioner Gishwiller sold two properties owned by her. Upon the application of Klawans, receiver for the Investment Company, the District Court entered an order directing petitioner Gishwiller to deposit the proceeds of said sales amounting to \$1,407.82 with the Clerk of the District Court, who still holds said sum. The decree of the District Court makes no disposition or direction regarding these funds.

Jurisdiction of This Court.

The jurisdiction of this Court is based upon paragraph 240 of the Judicial Code of the United States, as amended (28 U. S. C. A. 347).

The opinion of the Circuit Court of Appeals, written by Otto Kerner, Justice, was filed June 19, 1947 (R. 739). The decree of that Court was entered on June 19, 1937 (R. 750).

A petition for rehearing was filed and was denied by the Court on August 7, 1947 (R. 751).

Questions Presented.

1. Whether petitioner Gishwiller was deprived of her property in violation of Amendments IV and V to the Constitution of the United States by the conduct of the court's receiver in taking possession of her property where such receiver was appointed receiver only for the property of the Investment Company.

Whether the failure of the lower courts to order the return of petitioner Gishwiller's property constituted a deprivation of her rights as guaranteed by those amendments to the Constitution.

2. Whether the action of the District Court in appointing an agent of the Comptroller of the Currency (the real plaintiff herein) to make an inventory, report and audit of the assets, books and records of the Investment Company constituted an unlawful search and seizure of its property in violation of Amendment IV to the Constitution of the United States; and whether the unauthorized act of the court's appointee in making an inventory of the assets and records of petitioner Gishwiller constituted an unlawful search and seizure of her property in violation of Amendment IV to the Constitution of the United States.

3. Whether a decree of the District Court can be sustained when neither the master nor that Court made findings of fact or conclusions of law, as required by Rule 52, Federal Rules of Civil Procedure for District Courts.

4. Whether the action of the District Court in enjoining the sale or other disposition of real estate owned by petitioners, not involved in this suit; and in restraining various banks from disbursing funds deposited therein in the names of petitioners, was erroneous and in conflict with decisions of this Court.

5. Whether the District Court erred in appointing a receiver for the Investment Company, which was not charged to be insolvent, upon the application of an unsecured creditor, and whether the District Court erred in failing to discharge the receiver and dissolve the injunction or limit the receivership and injunction to the single piece of property, which under the allegations of the complaint, was the only property involved in this suit.

6. Whether there is any evidence of the alleged conspiracy in this record.

**Reasons Relied Upon for the
Allowance of the Writ of Certiorari.**

I.

On June 25, 1937, the District Court appointed Leslie H. Klawans, receiver for the Investment Company. He was not appointed Receiver for petitioner Gishwiller.

In addition to taking possession of all the property of the Investment Company, he arbitrarily took possession of all real and personal property of petitioner Gishwiller, except household furniture, one automobile, and a non-productive tract of land located in the Province of Alberta, Canada. In the inventory (R. 214-225) he filed in the District Court, her property is listed (R. 216—Items 16, 25, 26, 33, 187 and 191 cover her real estate. R. 244—Schedule 19 covers her personal property). Petitioner Gishwiller's property consisted of 6 parcels of real estate, 3 of which were improved, and her personalty. Possession of that property has been retained by the receiver for the Investment Company for more than 10 years.

A petition was filed in the District Court (R. 289, Par. 3) petitioning that Court to direct the receiver for the Investment Company to release the properties of petitioner Gishwiller. It was not successful (R. 404 Order of Court).

The illegal act of the Court's receiver in taking and retaining possession of the property of petitioner Gishwiller deprived her of her property without due process of law. The failure of the District Court to order the return of that property to petitioner Gishwiller or to adjudicate the question of the unlawful seizure thereof

constituted an arbitrary and capricious exercise of its judicial power, depriving her of her property in violation of Amendments IV and V to the Constitution of the United States. Neither the District Court in its decree nor the Circuit Court of Appeals in its opinion, refer to the unlawful seizure of this property.

II.

On June 26, 1937, the District Court appointed Leon J. Gell, an investigator in the employ of the Comptroller of the Currency (the real plaintiff in this suit) to make an "inventory, report and audit" of the assets, books and records of the Investment Company.

Gell, made an inventory, report and audit not only of the assets, records and effects of the Investment Company but of petitioner Gishwiller, as well.

The action of an agent of the real plaintiff herein, who was appointed by the District Court to make an inventory, report and audit of the Investment Company, in taking possession of and making an inventory, report and audit of the assets, records and personal property of petitioners, constitutes an illegal search and seizure of their property, in violation of their rights guaranteed by Amendment IV to the Constitution of the United States.

III.

Neither the reports of the master nor the decree of the District Court contain findings of fact and conclusions of law as required by Rule 52 of the Rules of Civil procedure for District Courts of the United States. The District Court in its decree adopts the purported findings of fact and conclusions of law of the master. The master's reports contained no findings of fact, as contemplated by

the Rule, and no conclusions of law. The findings of fact in those reports are findings of evidentiary facts. There are no findings of ultimate facts sustaining the charge of conspiracy in the master's reports or the decree of the District Court.

IV.

June 19, 1937, immediately following the filing of this suit, the District Court issued a restraining order (R. 47) followed by an injunction (R. 77) restraining petitioners from selling or disposing of properties described in the bill of complaint, 15 of which were owned by the Investment Company, and from selling or disposing of properties acquired directly or indirectly from the bank receivership. Petitioner Gishwiller did not own any of the described properties.

June 29, 1937, the District Court enjoined banks from paying out funds from accounts in the names of petitioners (R. 55 & 57).

The action of the District Court in enjoining the sale or other disposition of real estate owned by petitioner Investment Company and not involved in this suit, and in restraining banks from disbursing funds deposited therein in the names of petitioners, was erroneous, and in apparent conflict with the decisions of this Court (*DeBeers Consolidated Mines v. United States*, 325 U. S. 212, at 222).

V.

The District Court appointed a receiver for the Investment Company and issued an injunction against it without service of process on anyone but an office boy, without an allegation of insolvency and upon the application of an un-

secured creditor. The action of that Court in appointing a receiver, and its subsequent failure to discharge the receiver and dissolve the injunction or to limit the receivership and injunction to the single piece of property which, under the allegations of the complaint, was the only property owned by petitioners involved in this suit, is in apparent conflict with the decisions of this Court.

VI.

There is an entire absence of evidence in this record to sustain the charge of conspiracy.

Neither the decree of the District Court (R. 690) nor the opinion of the Circuit Court of Appeals (R. 739) discloses the facts of which the alleged conspiracy consists.

Wherefore your petitioners pray that a writ of certiorari issue under the seal of the Court, directed to the Circuit Court of Appeals for the Seventh Circuit, to the end that this cause may be reviewed by this Court as provided by the Statutes of the United States and that the decree herein of said Circuit Court of Appeals be reversed by this Court and for such relief as to this Court may seem proper.

Respectfully submitted,

Otis F. Glenn,

Raymond G. Real,

Otto W. Barnes,

Counsel for Petitioners.

Raymond G. Real,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No.

FERN NORTH GISHWILLER and
CALUMET BOND & INVESTMENT COMPANY,
Petitioners.

vs.

JOSEPH T. CONNOLLY, as Receiver of Calumet National
Bank of Chicago, a National Banking Association,
(in liquidation),
Respondent.

BRIEF IN SUPPORT OF PETITION.

Decrees Below.

The decree of the District Court was entered on June 6, 1946, Judge William H. Holly presiding (R. 690). The money decree against petitioner Gishwiller was in the sum of \$16,889.17 and against the Investment Company, \$7,900.55 with a provision that the total recovery should not exceed \$16,889.17 and costs (R. 702).

The opinion of the Circuit Court of Appeals, written by Otto Kerner, Justice, was entered June 19, 1947 and

the decree of the Court was entered on that date. The opinion is reported in 162 F. (2) 428 and appears at Record 739.

Jurisdiction of the Court.

A statement of the jurisdiction of this Court appears herein at page 6.

Statement of Matters Involved.

A statement of the matters involved is set forth in this petition at pages 1 to 6.

Constitutional Provisions.

The constitutional provisions involved are Amendments IV and V to the Constitution of the United States. They are set forth in the Appendix of this brief at page 31.

Specification of Assigned Errors.

1. The action of the receiver for the Investment Company in taking possession of real and personal property owned by petitioner Gishwiller, without legal authority, was erroneous. The failure of the lower courts to order the return of that property has deprived her of her property in violation of Amendments IV and V to the Constitution of the United States.

2. The property of petitioners was unlawfully searched and seized in violation of Amendment IV to the Constitution of the United States, when the District Court appointed an agent of the plaintiff to make an inventory, report and audit of the assets, books and records of the Investment Company, a defendant; and that agent, the court's appointee, likewise made an inventory of the property of petitioner Gishwiller, another defendant.

3. The decrees of the lower courts are erroneous for the reason that there has been no compliance with Rule 52 of the Rules of Civil Procedure for District Courts, requiring the District Court in its decree to make findings of fact and conclusions of law, in non-jury cases.

4. The District Court erred in enjoining the sale or other disposition of real estate, owned by petitioners, and not involved in this suit; and in restraining various banks from disbursing funds deposited therein in the names of petitioners.

5. The District Court erred in appointing a receiver for the Investment Company upon the application of an unsecured creditor and in failing to dissolve the injunction and discharge the receiver, or in the alternative, to limit the injunction and receivership to the only piece of property involved in this suit which belonged to petitioners.

6. The lower courts erred in finding that a conspiracy existed. The evidence in the record fails to establish the alleged conspiracy. It affirmatively establishes that no conspiracy existed.

ARGUMENT.

I.

The action of the Receiver for the Investment Company appointed by the district court in taking possession of real and personal property owned by Petitioner Gishwiller and the failure of that court to order the return to her of that property, constitutes an unlawful seizure and deprivation of her property in violation of Amendments IV and V to the Constitution of the United States.

The receiver for the Investment Company was not appointed receiver for the property of petitioner Gishwiller; nevertheless, upon his appointment and during the absence of petitioner Gishwiller, he took possession of all of her real and personal property (with the exceptions heretofore noted) and included that property in the inventory filed in the District Court (R. 214-225, R. 216, Items 16, 25, 26, 33, 187 & 191, incorporate her real estate. R. 224-Schedule 19, inventories here personal property). The receiver has retained possession of it from that date to the present time.

Under the allegations of the bill of complaint, and under the restraining order of the Court, the only property of which the Court had jurisdiction was property described in the complaint and property obtained directly or indirectly from the bank receivership. None of petitioner Gishwiller's property was described in the complaint and she owned no real estate or mortgages obtained directly or indirectly from the bank receiver. Therefore, the Court had no jurisdiction of her property. Its failure to direct the return of that property to her, seizure of which had been taken illegally by the court's receiver, constituted

an arbitrary and capricious exercise of judicial power and a deprivation of the property of petitioner Gishwiller without due process of law under Amendments IV and V to the Constitution of the United States. The affirmance of the decree of the District Court by the Circuit Court of Appeals amounted to a confirmation of that arbitrary and capricious exercise of its judicial powers by the District Court in violation of the rights of petitioner Gishwiller under those amendments to the Constitution.

In order that judicial proceedings constitute due process, the tribunal must have jurisdiction. The District Court had no jurisdiction of the property of petitioner Gishwiller. (*Twining v. New Jersey*, 211 U. S. 78, at 110 *Scott v. McNeil*, 154 U. S. 34. *Pennoyer v. Neff*, 95 U. S. 714, at 733.) Amendments IV and V to the Constitution of the United States protect litigants from the arbitrary and capricious exercise of judicial power by courts. (*Truax v. Corrigan*, 257 U. S. 312, at 332. *Railroad Commission v. Pacific Gas Co.*, 302 U. S. 388, at 393.)

After plaintiff's evidence in chief had been completed an effort was made (R. 288) upon behalf of petitioner Gishwiller to obtain the return of her property, possession of which had been taken illegally by the court's receiver. It was not successful (R. 404 Order of Court).

Petitioner Gishwiller sold two properties owned by her after the appointment of the receiver for the Investment Company. On the application of Klawans, its receiver (R. 335), the District Court entered an order (R. 361) directing her to deposit the proceeds of those sales, amounting to \$1,407.82, with the Clerk of the District Court who still is in possession of those funds. The Decree of the District Court makes no provision for these funds.

The failure of the lower courts to adjudicate the question of the illegal seizure of her property by the receiver for the Investment Company and the failure of those Courts to order the return of that property to her was erroneous and in violation of Amendments IV and V to the Constitution of the United States.

II.

The action of the district court in appointing an agent of the Comptroller of the currency (the real plaintiff) to make an inventory, report and audit of the assets, books and records of the Investment Company and the act of said agent in making an inventory of the property of Petitioner Gishwiller constituted an unlawful search and seizure of the property of these petitioners.

The District Court was without authority to appoint an agent of the real plaintiff herein to make an "inventory, report and audit" of the assets, books and records of the Investment Company, one of the defendants. The Court had full knowledge that Gell was an agent of the actual plaintiff (R. 51). This action of the District Court, constituted an unlawful search and seizure of the assets and records of the Investment Company in violation of Amendment IV to the Constitution of the United States. A corporation is protected against unlawful searches and seizures of its records and property to the same extent as individuals (*Hale v. Henkel*, 201 U. S. 43, at 76. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298).

Under the order of the District Court appointing Gell to make an inventory, report and audit of the assets, books and records of the Investment Company (R. 54) no authority was granted to him to make a similar inventory

of the assets and records of petitioner Gishwiller; nevertheless, he proceeded to do so (Tr. 2895 to 2899; 2909; 2914-15). The inventory filed with the District Court in this cause was prepared by Gell (Tr. 2894 to 2898). Included in that inventory was the property and records of petitioner Gishwiller (R. 214 to 225).

It should have been anticipated that petitioners, who were defendants, would be prejudiced by the appointment of an agent of the plaintiff for this purpose. At the hearings before the master, it was charged repeatedly by the then counsel for petitioners, that Gell, the agent of the plaintiff, concealed, lost or mislaid documents which came into his possession as the court's appointee (Tr. 4545-6; 8778 to 8786; 9588 to 9592; 9721 to 9723). Furthermore, the extent to which petitioners' rights were prejudiced by the action of the District Court, its receiver Klawans, and Gell is demonstrated by the fact that the evidence discloses petitioners' defense was closed June 14, 1939 (Tr. 7043; 7048-49); but it was not until subsequent to November 17, 1939 (Tr. 8856 to 8872; 8879 to 8894) that petitioner Gishwiller was able to examine any of the records of the Investment Company which she owned, or her personal records, or to obtain any of them except those records produced by plaintiff in the presentation of his case (See Colloquy Tr. 8545-46; 8759 to 8765; 8840 to 8843; 8856 to 8873; 9588 to 9592; 9721 to 9723). Plaintiff was able to produce at will any of those books, documents or records which were considered of value in the presentation of his case.

III.

The district court failed to make findings of fact and conclusions of law as required by Rule 52 of the Rules of Civil Procedure for District Courts.

Neither the reports of the master nor the decree of the District Court contain findings of fact and conclusions of law as required by Rule 52 of the Rules of Civil Procedure for District Courts of the United States. The District Court in its decree adopts the purported findings of fact and conclusions of law of the master. The master's reports contain no findings of fact, as contemplated by the Rule, and no conclusions of law. The findings of fact in those reports are findings of evidentiary facts. The special findings of fact required by the Rule are findings of ultimate facts, which sustain the allegations of the complaint. There are no such findings in the master's reports or the decree of the District Court (*Interstate Circuit Inc. v. United States*, 304 U. S. 55, at 56. *Railroad Commission v. Maxcy*, 281 U. S. 82.).

The master made one finding of fact, which if it were true, would in a measure sustain one of the allegations of the bill of complaint.

Receivers Buck and Hallenbeck followed a practice of directing Mrs. Gishwiller to prepare letters for their signature, addressed to the Comptroller. She was told by the receivers what to incorporate in those letters and she prepared them without dictation. If the letters contained the desired information, they were signed by the receivers and mailed. In very few instances did either of the receivers dictate letters. Both Hallenbeck and Buck testified that the letters so prepared by Mrs. Gishwiller contained the information that they directed be incorporated therein.

As to those letters and/or telegrams prepared by Mrs. Gishwiller for Buck's signature, addressed to the Comptroller, the master found that, "Mrs. Gishwiller wrote to the Comptroller", or words similar in nature. A finding of that kind appears 18 times in connection with letters and telegrams signed by Buck and addressed to the Comptroller (R. 450, 453, 455, 463, 470, 490, 491, 493, 495, 496, 498, 500, 501, 510, 512, 515, 519, 523).

In every instance in which Hallenbeck signed letters prepared by Mrs. Gishwiller for his signature, addressed to the Comptroller, we find the master very discriminating in his findings; that he customarily referred to those letters as being Hallenbeck's letters, and used the following language: "Mrs. Gishwiller thereupon prepared for Mr. Hallenbeck's signature a letter to the Comptroller", or words of similar import. A finding of that kind appears 6 times in connection with letters signed by Hallenbeck and addressed to the Comptroller (R. 520, 521, 529, 530, 531, 540).

If Mrs. Gishwiller prepared, signed and forwarded to the Comptroller, letters recommending sales of assets to Cramer, one of the allegations of the complaint would be sustained. In each instance letters to the Comptroller were ordered prepared by the receivers; were signed by them; were identified by them; and contained the information they desired incorporated therein (Tr. 849; 855; 858 to 860; 5564-5-6; 5570; 5581; 5641-2; 5655; 5703; 5711 to 5714; 5771 to 5775; 5800; 5820; 5850; 5863; 5881-2-3; 5931 to 5935; 5951-2; 6062-3; 6094-5-6; 6317 to 6319; 6407; 6523; 6540 to 6544; 6549-6554; 6558-9; 6589; 6697 to 6700; 6861-2).

The report of the master in this respect was not only incorrect but appears to have been designedly incorrect.

The master attempted to make one finding of fact with

reference to the alleged conspiracy. That finding (R. 544) is as follows:

“The ultimate fact upon which this case depends is whether or not there was a conspiracy. In view of the nebulous quality of conspiracies and the difficulty of precise and adequate definition, the master instead of attempting one contents himself with quoting the following statement of Abraham Lincoln:

(Here follows a paragraph from a statement made by Abraham Lincoln.)

The undersigned accordingly finds that there was a conspiracy to defraud the Calumet National Bank receivership and that Richard Cramer, Fern North Gishwiller, the Calumet Bond & Investment Company, Glenn R. Gans, Charles W. Baldridge, Mrs. B. Cramer, G. K. Soules, John H. Bracken, William W. Gildersleeve, and perhaps others, were parties thereto; that J Russell Christianson was not a party to the conspiracy.”

This is not a finding of the ultimate facts to support the charge of conspiracy alleged in the bill of complaint but is merely a conclusion that a conspiracy existed. It does not comply with the Rule (*Interstate Circuit Inc. v. U. S.*, 304 U. S. 55, at 56. *Railroad Commission v. Maxcy*, 281 U. S. 82.) This is the only finding of the master with reference to the ultimate fact of conspiracy and there are no other findings of ultimate facts contained in his reports. There are no findings of fact or conclusions of law in the decree of the District Court.

IV.

The district court erred in restraining the sale or other disposition of real estate owned by petitioners and not involved in this suit and in enjoining banks from disbursing funds therein in the names of petitioners.

The District Court enjoined the sale or other disposition of real estate described in the bill of complaint (R. 31 to 39, inc.) and enjoined the sale of any property purchased directly or indirectly from the bank receivership (R. 79 Par. 1 & 2). Some of the property described in the complaint belonged to petitioner Investment Company (R. 110-113-Parcels 3 to 11, inc. R. 114-115-Parcels 19 to 23, inc.) none of which at any time belonged to the bank receivership. It enjoined banks from paying to petitioners any funds in their accounts in those banks (R. 55 & 57). Upon his appointment, the receiver for the Investment Company took possession of all the real and personal property of petitioner Gishwiller (with the three exceptions heretofore noted). By stripping petitioners of their assets the plaintiff, to the best of his ability, made certain that they would be unable to defend this suit.

This Court stated in *DeBeers Consolidated Mines v. United States*, 325 U. S. 212, at 222 with respect to relief of this character:

“Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-

called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence."

The District Court recognized that as to the properties of petitioner Gishwiller the injunction should be lifted for it stated in its memorandum opinion (R. 401):

"* * * there are no authorities authorizing 'equitable attachment,' and as to the properties title to which is in Fern North Gishwiller, the injunction should be lifted."

but the Court failed to lift the injunction as to those properties (R. 404).

Three applications were made to the District Court (1) to remove the receiver for the Investment Company (R. 63); (2 & 3) to remove the receiver and lift the injunction or in the alternative to limit the injunction and receivership to the one piece of property owned by petitioners involved in this suit. The second application (R. 252) was made after plaintiff's evidence had been completed. Petitioners had concluded their defense when the third application was made (R. 288; R. 371 Par. 1). It was apparent at that time that petitioner Gishwiller owned no property or mortgages obtained directly or indirectly from the bank receivership and that the Investment Company owned but one parcel of real estate which had been obtained from Baldridge who had purchased the equity from the bank receivership.

The District Court on that occasion should have dissolved the injunction and discharged the receiver or limited the injunction and receivership to this single piece of property which, under the allegations of the complaint, was the only property involved in this suit that was owned by these

petitioners. Its failure to do so and the affirmance of that action by the Circuit Court of Appeals constitutes error.

V.

The district court erred in appointing a receiver for the Investment Company, which was not alleged to be insolvent, upon the application of an unsecured creditor and in failing to discharge the receiver and dissolve the injunction or to limit the injunction and receivership to the single property owned by petitioners involved in this litigation.

When this suit was filed a restraining order was issued (R. 45) followed by an injunction (R. 77) restraining petitioners from selling or otherwise disposing of any property which they owned described in the complaint, or any property purchased directly or indirectly from the bank receivership. The complaint charged:

“That all, or substantially all, of the assets, of said Investment Company have been acquired by it by purchase, exchange or otherwise, by the use of moneys and properties and proceeds of properties wrongfully obtained from said receivership estate or with the profits and advantages obtained by said * * * Company * * * acquired from said Receivers by virtue of said conspiracy, fraud, misrepresentations, and deceits, and that said * * * Company has no other substantial assets.” (R. 39, Par. 33.)

The evidence discloses that petitioner Gishwiller owned no real estate or mortgages acquired directly or indirectly from the bank receivership. Most of the property of the Investment Company had been owned by it for many years prior to the closing of the bank. The master in his report (R. 435) found that after the Investment Company had been liquidated in 1933, it had 8 parcels of

real estate. The Investment Company owned 12 parcels of real estate purchased from Wm. L. O'Connell, state bank receiver. Only one piece of real estate owned by the Investment Company had been acquired directly or indirectly from the bank receivership. That property was located at 3029 East 92nd Street (the "Office Building") which was acquired from Baldrige who purchased the equity therein from the bank receiver. Baldrige paid \$1,500.00 for the equity subject to liens and judgments of \$12,234.00 (R. 494. Par. 2, R. 495, Par. 3, R. 496, Par. 1). Long afterwards, this equity subject to the liens, was acquired by petitioner Gishwiller from Baldrige for which she paid \$2,000.00 (R. 436, Par. 7. R. 498, First Sentence). On May 1, 1936, a deed (Gish. Ex. 143) was issued conveying title direct to the Investment Company. The Investment Company expended \$7,264.08 on repairs and improvements (Ptf. Ex. 578-579. Gish. Ex. 139. Tr. 4162). After the repairs and improvements were completed a loan association valued the property at \$18,000.00 (R. 497, Pars. 2-3). The master's report (R. 662-Item 1237) directs title to the property be conveyed to plaintiff but allows a credit to petitioners of \$17,219.67.

Under the allegations of the complaint, this was the only property owned by petitioners which originated with the bank receivership. Petitioner Gishwiller paid full value for the equity in that property. If there was irregularity about the purchase of the equity by Baldrige from the bank receiver, a decree in this cause should have been entered against Baldrige in connection with that property. No such decree was entered. Petitioner Gishwiller, the secondary purchaser of this equity has been held liable, while the primary purchaser from the bank receiver is absolved of liability. The Investment Company likewise has been held liable for this property because the title was conveyed to it.

The only claim the plaintiff in this cause would have against the Investment Company in connection with this particular property was in its nature an unsecured claim. The effect of the decree of the District Court and its affirmance by the Circuit Court of Appeals establishes a rule that receivers can be appointed in pending litigation upon behalf of an unsecured creditor which is in conflict with the decisions of this Court (*The Pusey & Jones Corp v. Hanssen*, 261 U. S. 491. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371). We respectfully submit the action of the lower court in this respect was erroneous.

Since neither of petitioners purchased real estate or mortgages direct from the receivership and only one piece of property was owned by the Investment Company which had its origin with the bank receivership, the injunction and receivership should have been limited to this single piece of property.

The Circuit Court of Appeals in affirming the decree of the District Court said (R. 749, Par. 1):

“In *Our Case* the court was confronted with the problem of either preventing the defendants from concealing or disposing of the assets or of allowing them to make away with the fruits of the fraud charged against them. Under the circumstances and in view of this record we cannot say that the court abused its discretion *when it appointed the receiver and awarded the injunctive relief to preserve the status quo pending the litigation.*” (Emphasis Ours.)

We respectfully submit that this portion of the opinion of the Circuit Court of Appeals is in conflict with the decisions of this Court (*DeBeers Consolidated Mines v. United States*, 325 U. S. 212, at 222. *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377, at 381). It is not the law that injunctions may be issued and receivers appointed in order that

all the property of a defendant may be held until such time as a plaintiff has an opportunity to establish some claim against the defendant and thereby realize satisfaction from property so held.

The District Court erred in appointing a receiver for the Investment Company, and in failing to dissolve the injunction and discharge the receiver, or in the alternative to limit the injunction and receivership to the single property involved in this suit.

VI.

There is an entire absence of evidence in this record to sustain the charge of conspiracy.

The decree of the District Court (R. 690) makes no findings of fact. The Circuit Court of Appeals found that the facts together with inferences to be drawn therefrom sustained the charge of conspiracy (R. 745, Par. 4). In its opinion the Circuit Court of Appeals stated no facts which sustain the charge of conspiracy against these petitioners. It made two statements which if sustained by the evidence might have established one element of the charge of conspiracy insofar as Gans the appraiser, and Cramer the real estate man, were concerned. In its opinion the Court said (R. 743, Par. 2):

“In the spring of 1935 he (Gans) was sent by Cramer to the office of the bank where he was interviewed by Gishwiller upon the subject of furnishing appraisals for the receivership assets, but Buck never spoke to or saw Gans.”

There is no evidence in the record to sustain that statement and the Circuit Court of Appeals was so advised in a petition for rehearing. Further, the Court said (R. 742 Par. 2):

“Appraisals for the assets furnished by Gans were

forwarded to the Comptroller * * * which matched Cramer's offers and were calculated to reflect, not the true value of the property, but, rather, to induce acceptance. In some instances Gans' appraisals were higher than the offers submitted by Cramer, but in most of the cases since these operations began, Gans' appraisals were that each asset possessed about the same value as the price offered by Cramer."

In the petition to the Circuit Court of Appeals for rehearing, it was pointed out that Gans' average appraisals exceeded the Cramer offers by 71%. This would hardly justify the conclusion of the Court that

"* * * in most of the cases * * * Gans' appraisals were that each asset possessed about the same value as the price offered by Cramer."

In the Appendix hereto (p. 33-34) we reproduce a schedule which appeared in that petition for rehearing. It reflects the various offers made by Cramer for each asset and the appraisals made by Gans of real estate owned by the receivership and of the property underlying mortgages. It discloses that the aggregate of the Cramer offers was \$96,173.74 for the real estate and mortgages purchased by him and that the aggregate of Gans' appraisals of the real estate and property underlying the mortgages was \$159,250.00 to \$171,250.00.

In the absence of proper findings of fact and conclusions of law by the District Court, and no statement of facts supporting the alleged conspiracy in the opinion of the Circuit Court of Appeals, it is impossible to determine of what the alleged conspiracy consisted.

CONCLUSION.

While a number of reasons are assigned in this petition for the allowance of a writ of certiorari, the most important one involves the unlawful seizure of the real and personal property of petitioner Gishwiller by the receiver for the Investment Company. He was not appointed receiver for the property of petitioner Gishwiller. The seizure of that property more than 10 years ago and its retention until the present time was a ruthless and illegal act. She was unable to obtain an adjudication of her rights in this respect from the District Court although the question was raised directly in that Court. The question was raised again in the Circuit Court of Appeals without an adjudication by that Court. The seizure of that property by a court's officer was a direct violation of the rights of petitioner Gishwiller under the due process clause of the Constitution.

It is appalling to think that a litigant whose property is seized unlawfully by a Federal Court's receiver can obtain neither an adjudication of her rights nor any relief from the unlawful seizure in the lower courts and is compelled to petition this Court for the protection of her constitutional rights.

We respectfully pray that this Court grant the petition for a writ of certiorari in this cause.

Respectfully submitted,

OTIS F. GLENN,

RAYMOND G. REAL,

OTTO W. BARNES,

Counsel for Petitioners.

RAYMOND G. REAL,
Of Counsel.

APPENDIX.

Constitutional Provisions.

Amendment IV. "The right of the people to be secure in their person, houses, papers and effects against unreasonable search and seizure shall not be violated * * *".

Amendment V. "No person shall be * * * deprived of life, liberty or property without due process of law * * *".

Rules of Civil Procedure for District Courts.

"Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury the court shall find the facts specially and state separately the conclusions of law thereon and direct the entry of the appropriate judgment; * * *. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

Federal Statutes.

Section 240, Amended of the Judicial Code (28 U.S.C. A. Sec. 347).

"Certiorari to Circuit Courts of Appeals and Court of Appeals of District of Columbia; Appeal or Writ of Error to Supreme Court from Circuit Courts of Appeals in Certain Cases; Other Reviews not allowed.

(a)—In any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree

by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.”

SCHEDULE.

SCHEDULE No. 1

PROPERTY WHICH RECEIVERSHIP OWNED

| Asset No. | Cramer's Offer. | Ptf. Ex. Number | Gans' Appraisals. | Ptf. Ex. Number |
|--------------|--------------------|--------------------|----------------------------|--------------------|
| 564) | \$ | | | |
| 565) | | | | |
| 566) | | | | |
| 567) | 5,000.00 | 514 | \$ 8,800.00 to \$10,000.00 | 516 |
| 1205 | 4,000.00 | 43 | 3,900.00 to 4,100.00 | 44 |
| 58-59 | 3,500.00 | 531 | 3,500.00 to 3,500.00 | 533 |
| None | 2,000.00 | No Ex. | 5,000.00 to 5,500.00 | 549 |
| 1237 | 2,500.00 | No Ex. | 11,500.00 to 12,000.00 | 558 |
| 702 | 5,000.00 | No Ex. | 5,000.00 to 5,250.00 | 368 |
| 232 | 15,000.00 | 384, 385 & 388 | 17,000.00 to 19,000.00 | 383 |
| 553 | 5,000.00 | 139 | 4,750.00 to 5,000.00 | 141 |
| Totals: | \$42,000.00 | | \$59,450.00 to \$64,350.00 | |

SCHEDULE No. 2

MORTGAGES OWNED BY THE RECEIVERSHIP.

| Asset No. | Cramer's Offer. | Ptf. Ex. Number | Gans' Appraisals Property Underlying. | Ptf. Ex. Number. |
|-------------------------|--------------------|--------------------|--|---------------------|
| 192 | \$ 9,000.00 | 489 | \$15,000.00 to \$16,500.00 | 491 |
| * | | | | |
| Group Two of Mortgages. | | | | |
| 171) | | | 17,500.00 to 19,000.00 | 383&269/A |
| 428) | | | 18,000.00 to 19,000.00 | 269/G |
| 451) | | | 4,300.00 to 4,600.00 | 269/C |
| 547) For | | | 8,500.00 to 8,500.00 | 269/D |
| 562) Six Mortgages, | | | 9,500.00 to 10,500.00 | 269/E |
| 629) 37,000.00 | | 268 | 4,500.00 to 4,800.00 | 269/F |

| Group One of Mortgages. | | | | | |
|-------------------------|-------------|-------------|-----------------------------|----------|-----|
| 28) | \$7,000.00 | & | 5,250.00 to | 5,500.00 | 192 |
| 193) | 728.74 | Foreclosure | 4,000.00 to | 4,250.00 | " |
| 321) | | costs & | 3,250.00 to | 3,500.00 | " |
| 532) | 445.00 | atty fees | 3,000.00 to | 3,250.00 | " |
| 662) | | | 3,000.00 to | 3,250.00 | " |
| 684) | 8,173.74 | 187 | 4,000.00 to | 4,250.00 | " |
| <hr/> | | | | | |
| Grand | | | | | |
| Total | \$54,173.74 | | \$99,800.00 to \$106,900.00 | | |

* Asset 555, a mortgage signed by Carl Schmidt for \$3,500.00, secured by property at 10751 Avenue O, has been omitted from the above tabulation because the offer was for title to the property, which title the bank receivership did not own; therefore, it does not qualify as the sale of a mortgage or the sale of a previously owned title.

Motion to Dispense with Printing of Evidence.

Now come petitioners, Fern North Gishwiller and Calumet Bond & Investment Company, and pray the court for leave to dispense with the printing of the evidence in this cause, and as reasons therefor show:

That on June 18, 1937 this suit was filed; on June 19, 1937, the District Court issued a restraining order and subsequently on July 14, 1937, an injunction; and on June 25, 1937, the court appointed a receiver for petitioner, Calumet Bond & Investment Company, which company is owned by petitioner, Fern North Gishwiller;

That said receiver thereupon took possession of all of the property of said Investment Company and likewise took possession of all real estate and personal effects of petitioner Gishwiller, except one automobile, household furniture, and a non-productive parcel of land in the Province of Alberta, Canada of nominal value. That three efforts were made to remove said receiver and to lift or modify the injunction, without success, and said property has been subject to said injunction and in the possession of said receiver for more than ten years;

That these petitioners have no assets other than those,

possession of which, was taken by said receiver (with the exceptions heretofore noted) and that although said petitioners cannot make an affidavit of insolvency, they are unable to pay the expense of printing the evidence in this cause aggregating 9,896 pages; and that petitioners were relieved of printing said evidence in the Circuit Court of Appeals;

That petitioners have heretofore, and are now, paying the cost of this litigation with funds borrowed from friends.

Therefore, petitioners move that they be relieved of printing the evidence in this cause.

Respectfully submitted,

Fern North Gishwiller

CALUMET BOND & INVESTMENT COMPANY,

By *Fern North Gishwiller*

Secretary-Treasurer.

State of Illinois) ss.
County of Cook)

Fern North Gishwiller, being first duly sworn on oath deposes and says that she is one of the petitioners herein; that she is the owner of all of the stock of the other petitioner herein, and is authorized by it to execute this affidavit and that the facts set forth in the foregoing motion are true and correct.

Fern North Gishwiller

Subscribed and Sworn to
before me this 27th

day of October, 1947.

C. H. Barnes

Notary Public.